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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. THEANY TOR, Defendant and Appellant.	B208419 (Los Angeles County Super. Ct. No. NA075096)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Law Offices of Joy A. Maulitz and Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Theany Tor guilty of receiving stolen property—a handgun—in violation of Penal Code section 496, subdivision (a).[1] The trial court placed defendant on formal probation for a period of three years. In his timely appeal, defendant contends the trial court erroneously and prejudicially refused to instruct the jury on the defense of "transitory possession" based on *People v. Mijares* (1971) 6 Cal.3d 415 (*Mijares*). He also asserts the failure to so instruct violated his right to a unanimous verdict and to due process under the federal Constitution. We affirm.

STATEMENT OF FACTS

Gun Choi's Cerritos home was burglarized on July 23, 2007. The burglars stole two safes, which contained various personal items and two firearms. One was a loaded .38 caliber handgun. Choi had not given defendant or a person named Carlos permission to take those items.

The next evening, Officer Kevin Voorhis received a citizen complaint about persons living in a home that was supposed to be vacant. He responded to defendant's residence on 1441 Eleanor Street in Long Beach. From his neighborhood patrol activities, the officer was familiar with defendant as the owner or resident of that house. Officer Voorhis spoke to a person in front of the house and went inside to ask defendant (whom he knew as "Ken") whether that person had permission to be there. The officer walked through the front door and knocked on the rear bedroom door. Defendant answered, wearing only shorts and sandals, and confirmed his identity and that he owned the home. After receiving defendant's permission to search, Officer Voorhis looked in the bedroom and attached bathroom. The shower was wet and there were clothes in the closet. He found a black bag containing a loaded handgun in a closet under the sink.

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[1] All further statutory citations are to the Penal Code.

Officer Voorhis arrested defendant after verifying that the handgun was one of the weapons stolen from Choi. Inside the patrol car, the officer advised defendant of his *Miranda* rights.[2] Defendant said he understood his rights and agreed to speak to the officer. Defendant admitted it was his residence, but said he had never seen the handgun and did not know it was in his bathroom. Shortly thereafter, while the officer escorted defendant to the booking area, the officer asked whether defendant's fingerprints would be found on the weapon. Defendant responded: "I think I touch[ed] it." He proceeded to admit knowing the gun was in his house, telling the officer, "Carlos brought it over." He further admitted that he thought the gun was stolen at the time. No one at the house at the time of defendant's arrest was named Carlos.

Detective Peter Lackovic interviewed defendant on the afternoon of July 25. Regarding the stolen handgun, defendant explained that two of his friends, Carlos and "T," asked to borrow defendant's truck to steal two safes. When defendant refused, his friends stole a car to transport the safes to defendant's house. When the safes were opened, defendant saw two handguns and other items. At first, defendant denied touching the weapons. Defendant knew the guns were recently stolen by his friends. Later, however, defendant said he had touched one of the guns. Carlos showed him the gun and offered to sell it to him. Defendant examined it and gave it back to Carlos. At the time Officer Voorhis arrived, defendant was showering. Defendant did not know how the gun got into his bathroom.

On July 27, Officer Sean Irving went to defendant's residence to investigate the Choi burglary. He found two broken safes. One was in a trash can. The other had been pried open and left in the backyard with items of trash under a tarp.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

Defense

Marsha Craner had known defendant for approximately eight years. She met him when defendant owned a market that she patronized. After the market closed, defendant moved into her house to help her care for her ailing husband. Defendant was living at her house until the day before his arrest; he typically stayed in the garage. In July 2006, she accompanied him to the 1441 Eleanor residence four or five times. On July 23, she went there with defendant in the afternoon, so they could help defendant's friend pack for a trip. Carlos Barajas and Tommy were there too, playing darts in the garage. Defendant and Marsha joined them. Carlos left and returned a few minutes later with a revolver. He tossed it to defendant, saying: "Ken, here. Shoot with this." Defendant gave the gun back to Carlos. Carlos wrapped it in a towel and walked out of the garage, entered the back bedroom, and closed the bedroom doors. Marsha and defendant drove back to Marsha's house, where defendant spent the night. She conversed with defendant in English.[3]

Sovuth Kann testified that he and defendant conversed in Cambodian rather than in English. Kevin Kheth knows defendant to speak Cambodian and "a little bit of English." On rebuttal, defendant's neighbor Erika Arredondo testified that she conversed with defendant in English. Defendant told her that he owned the 1441 Eleanor residence.

DISCUSSION

Defendant's primary contention is that the trial court erroneously and prejudicially refused to sua sponte instruct the jury on the affirmative defense of momentary or transitory possession of the handgun for the purpose of disposing of it. As we explain, his claim fails because to the extent there was any evidence of transitory possession, it

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[3] Detective Peter Lackovic and Officer Voorhis testified that defendant conversed comfortably in English.

would not have provided a defense to the prosecution's case, which was based on defendant's constructive possession on the day after the supposed transitory possession took place.

The instruction defendant faults the trial court for failing to give—Judicial Council of California Criminal Jury Instructions (2007-2008) CALCRIM No. 2305—arises out of the context of contraband possession cases and derives from *Mijares, supra,* 6 Cal.3d 415. There, our Supreme Court held that "under limited circumstances, momentary or transitory possession of an unlawful narcotic for the sole purpose of disposing of it can constitute a defense to a charge of criminal possession of the controlled substance." (*People v. Martin* (2001) 25 Cal.4th 1180, 1182, citing *Mijares, supra,* at p. 419.) "The *Mijares* theory has been alternately described as the 'temporary possession defense,' the 'momentary possession defense,' the 'transitory possession defense,' and the 'disposal defense.'" (*People v. Martin, supra,* at p. 1185, fn. 5.) In implementing *Mijares*, CALCRIM No. 2305 instructs that if the defendant possessed a controlled substance, such possession would not be illegal if the defendant can prove "the defense of momentary possession" whereby (1) the defendant possessed the controlled substance "only for a momentary or transitory period," (2) he or she did so in order to abandon, dispose of, or destroy it, and (3) he or she did not intend to prevent law enforcement officials from obtaining the contraband.[4]

It should be noted that this appeal does not concern the possession of narcotics or other contraband, but rather the receipt of stolen property. "[T]o sustain a conviction for receiving stolen property, the prosecution must prove (1) the property was stolen; (2) the defendant knew the property was stolen; and, (3) the defendant had possession of the stolen property. [Citations.] [¶] Possession of the stolen property may be actual or constructive and need not be exclusive. [Citations.] Physical possession is also not a requirement. It is sufficient if the defendant acquires a measure of control or dominion

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[4] The CALJIC pattern instruction implementing *Mijares* is CALJIC No. 12.06.

over the stolen property." (*People v. Land* (1994) 30 Cal.App.4th 220, 223-224, fn. omitted; see § 496, subd. (a).) Independent of the *Mijares* defense, there is a line of cases recognizing an analogous defense, referred to as "innocent intent," which is directly applicable to the crime of receiving stolen property.

Under the "innocent intent" doctrine, where the prosecution proves the elements of receiving stolen property, the defense can nevertheless prove his or her innocence by affirmatively proving "the defendant did not have any criminal intent but had, from the moment that he received the stolen property, intended to return it to the rightful owner." (*People v. Dishman* (1982) 128 Cal.App.3d 717, 722; see *People v. Osborne* (1978) 77 Cal.App.3d 472, 476 ["the *innocent intent* of returning the property to the true owner is a defense to the charge of attempted receiving of stolen property"]; *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494; CALCRIM No. 1751; CALJIC No. 14.66.)

Here, during a pretrial hearing, the trial court suggested the defense consider requesting the CALJIC No. 14.66 innocent intent instruction. At the close of evidence, the court found no evidence to merit an instruction under CALJIC No. 12.06, but indicated that it thought CALJIC No. 14.66 was appropriate. The prosecutor disagreed, arguing there was no evidence defendant intended to return the property to its rightful owner. The defense countered that "innocent intent" was shown by "the fact that [defendant] got rid of [the handgun] so quickly," merely having "transitory possession." This, in turn, tended to show he did not know the stolen item was in his house at the relevant time, and "if he had known the gun was in the location, the intention would not have been to maintain it or keep it."[5] The court pointed out, however, that the instruction was keyed to defendant's innocent intent at the time of possession, which was when the handgun was found in the house—and there was no evidence of such innocent intent at that time. Accordingly, it refused the instruction. In argument, the prosecutor said the case was tried exclusively on a theory of constructive—not actual—possession, based on

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[5] Although the defense used the phrase "transitory possession," it never referred to the *Mijares* line of cases or any instructions related to the *Mijares* defense.

defendant's conduct in the bathroom at the time the officer arrived. The defense agreed, arguing there was no solid evidence that defendant knew the handgun was in his bathroom and his refusal of the gun when Carlos offered it to him the day before tended to show defendant's ignorance on that point.

Defendant did not request a *Mijares* instruction. "[A] trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses is more limited, arising 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 195.) No such obligation arose here because, as the trial court understood, defendant could not effectively rely on *Mijares* even if he wanted to. The "transitory possession" defense could only have applied to defendant's conduct on the day before the salient possession allegedly occurred.[6] Moreover, the court's ruling entailed no prejudice to defendant because it did not preclude him from arguing, as he did, that his conduct on July 23 tended to show his lack of culpable knowledge on July 24.

Defendant also argues the trial court violated his right to a unanimous verdict and to due process under the federal Constitution by failing to instruct on the *Mijares* affirmative defense. The failure to instruct on a defense is state law error, and thus subject, under article VI, section 13 of the California Constitution, to the harmless-error test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See *People v.*

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6 In so holding, we have no occasion to reach the questions of whether defendant's conduct in returning the gun to Carlos amounted to a disposal for purposes of the *Mijares* defense or whether that defense even applies to the offense of receiving stolen property. In his reply brief, defendant argues he was entitled to an "innocent intent" instruction under the *Osborne/Dishman* line of cases. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) Even if the issue had been properly raised on appeal, it would fail. There was no evidence that defendant intended at any time to return the stolen handgun to its rightful owner.

Randle (2005) 35 Cal.4th 987, 1003 [failure to instruct on imperfect defense of others subject to *Watson* review], overruled on another point in *People v. Chun* (2009) 45 Cal.4th 1172; *People v. Breverman* (1998) 19 Cal.4th 142, 165, 178 [failure to instruct on heat of passion subject to *Watson* review].)

In any event, as our discussion has shown, whether reviewed for harmless error under *Watson* or under the harmless beyond a reasonable doubt standard for constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, there was no prejudice. The assertion that a juror might have found defendant guilty based on his "transitory possession" on July 23 is pure speculation. Not only was the *Mijares* defense inapplicable under the facts of defendant's case, but both parties agreed that defendant's alleged constructive possession on July 24 was the only available basis for convicting defendant. Accordingly, defendant's reliance on *People v. Barnes* (1997) 57 Cal.App.4th 552 is misplaced. There, the prosecution argued for conviction on theories of constructive and actual possession, where there was no evidence to support a conviction on the former theory. (*Id.* at pp. 555-556.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.